

To: Judy Bloom, Chris Sproul
cc:
From: Clyde Morris
Date: 02/06/96 07:22:15 AM
Subject: Re: UIC permit - again

Thanks to Chris for clarifying what we can and can not do with an UIC permit and to Judy for following-up on with the question. I am uncomfortable with asking Chris to spend much time looking into our ability to require nets or monitoring in a UIC permit condition if we are not going to want to use the condition in the Magma case. Perhaps it would be best if Judy would work with USFWS, AZG&F and NVDNR to determine how much of a threat the ponds are to wildlife before we ask Chris to spend time researching our ability to include a permit condition to protect the wildlife. There is a all-regions GW conf. call next week. If the opportunity presents itself, I could ask other regions to call us if they have any experience with permit conditions such as this.

To: Judy Bloom
cc: Clyde Morris
From: Chris Sproul
Date: 02/05/96 04:12:24 PM
Subject: Re: UIC permit - again

Judy:

I think my conversation with you was not as clear as it could have been. Sorry! Let me try again:

40 CFR 144.4, in my mind, adds nothing that isn't already required by other law and gives EPA no additional authority besides that which it has under federal statutes and other regulatory provisions. The provision merely restates the obvious: EPA must comply with all laws that apply to its activities. There is nothing in 40 CFR part 144 and 146, including section 144.4, nor in the SDWA that gives EPA the authority to require netting to protect birds or to require monitoring to see if there are impacts on birds.

EPA MIGHT have the authority to both require netting and to require monitoring as conditions in our UIC permit if the Migratory Bird Treaty Act or the ESA gives some general authority to federal permitting agencies to include such conditions in their permits as are necessary to implement those Acts. I have no expertise in the first statute and only limited experience with the ESA. I tend to doubt that either Act has such a provision, but I would have to research this further to give you a real legal opinion.

Another possibility: some EPA attorneys have expressed the opinion, at least in one conference that I attended, that NEPA gives EPA the authority to deny permits or impose conditions in permits when necessary to mitigate avoidable adverse environmental impacts, even when the permit denial or permit condition does not follow from EPA's own regulations. For example, a UIC permit can be denied for a facility that will not endanger a USDW, but will cause substantial adverse impacts when these impacts could be avoided by locating the facility at an alternative location. This view is controversial, however. I have not researched this myself and would need to do so to offer an opinion.

One thing seems clear to me: there would be no legal difference between requiring netting or requiring monitoring. Either we have the authority to do both or the authority to do neither. Let me know if the Program desires an opinion on these issues. It would take considerable time, and again, I don't want to look into it unless the Program truly wants to exercise the authority if it is available (or is at least leaning toward using the authority, if it exists).

To: Chris Sproul
cc:

From: Judy Bloom
Date: 02/05/96 03:49:00 PM
Subject: UIC permit - again

Yes I'm back with one more question. Since we can't require any exclusionary device, and Fish and Wildlife probably cannot either (unless they can through some sort of endangered species consideration) can we require, or can Fish and Wildlife require, monitoring of the site to insure that there are no takings of migratory birds?

If there is an endangered species issue, can we write it into the permit conditions since the CFR 144.4 tells us to consider them?

This is so confusing!